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MEMORANDUM OF LAW

DATE: September 11, 2015

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: San Diego Municipal Code Section 52.80.01 Relating to Trespass, Peaceful Political Activity

INTRODUCTION

San Diego Municipal Code (Municipal Code) section 52.80.01 generally prohibits trespassing on privately operated business premises, with several exceptions. This section was enacted in 1977 and has never been amended. An update to this section of the Municipal Code is now necessary in order to maintain consistency with state and federal constitutional law.¹

QUESTION PRESENTED

Should the San Diego City Council (Council) consider amending Municipal Code section 52.80.01 to clarify the meaning of the exceptions in subsection (c), in accordance with state and federal constitutional principles?

SHORT ANSWER

Yes. The exceptions contained in Municipal Code section 52.80.01(c) are likely vulnerable to a legal challenge. If the Council desires to maintain San Diego's trespass ordinance, the exceptions should be updated to reflect current constitutional law.

¹ Additionally, Municipal Code section 52.80.01 has been involved in three recent lawsuits against the City: *APRL v. City of San Diego, et al.* (2013), *Cartmill, San Diego Animal Advocates (Cartmill) v. Sea World, Inc., et al.* (2010), and *Lutz v. CBRE, et al.* (2012). At issue in all of these cases was the exception contained in Municipal Code section 52.80.01(c)(2), for "peaceful political activity."

BACKGROUND

Municipal Code section 52.80.01 makes it unlawful for any person to use privately operated business premises open to the general public for any purpose contrary to the functions or services of the business after being asked to leave by the owner, operator, or owner's agent, or to re-enter such property within 48 hours of a request to leave.² The Municipal Code contains several exceptions to these provisions, including an exception which states, "[w]here their application would result in an interference with or inhibition of peaceful picketing directed toward the business establishment, lawful labor activities, or peaceful political activities." SDMC § 52.80.01(c)(2).

According to the legislative history, the primary impetus for the ordinance came from efforts of the hotel/motel industry to curb the distribution of cards advertising outcall massage establishments. Consultant Analysis, item O-77-172, Ken Capri. However, Mr. Capri noted that the ordinance was not limited to hotels/motels and advertising cards, but all activities considered by the owner to be contrary to the function or service provided by the business. *Id.*

ANALYSIS

I. GENERAL RULES OF STATUTORY INTERPRETATION

City ordinances are interpreted by rules of statutory interpretation. *See Castaneda v. Holcomb*, 114 Cal. App. 3d 939, 942 (1981); *City of Berkeley v. Cukierman*, 14 Cal. App. 4th 1331, 1338-41 (1993); *Howard Jarvis Taxpayers Association v. County of Orange*, 110 Cal. App. 4th 1375, 1381 (2003). The fundamental rule of statutory construction is to determine the intent of the Legislature in enacting the statute and intent is determined first by the language of the statute itself. *People v. Aston*, 39 Cal. 3d 481, 489 (1985). *See also* Cal. Civ. Proc. Code § 1859. A court looking at the statute will give the words their ordinary meaning. *People v. Rizo*, 22 Cal. 4th 681, 685 (2000).

"The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme." *Id.* (citing *Horwich v. Superior Court*, 21 Cal. 4th 272, 276 (1999)). The California Supreme Court has long held:

The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. Moreover, every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. Such purpose will not be sacrificed to a literal construction of any part of the act.

² The full text of section 52.80.01 is set forth in Attachment A.

Select Base Materials, Inc. v. Board of Equalization, 51 Cal. 2d 640, 645 (1959) (citations and quotations omitted).

However, if the application of a statute would lead to absurd results based on a plain reading of the language, that language “should not be given a literal meaning.” *Younger v. Superior Court*, 21 Cal. 3d 102, 113 (1978). If there is any question or ambiguity, the statute should be interpreted so as to harmonize with the rest of the statutory scheme. The language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute, and where possible the language should be read so as to conform to the spirit of the enactment. *Conrad v. Medical Bd. of California*, 48 Cal. App. 4th 1038, 1046 (1996). As the California Supreme Court has explained:

We do not examine [initiative] language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the [voters] did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute’s purpose, legislative history, and public policy.

Coalition of Concerned Communities, Inc. v. City of Los Angeles, 34 Cal. 4th 733, 737 (2004).

II. TRESPASS STATUTES MUST BE INTERPRETED CONSISTENTLY WITH CONSTITUTIONAL LAW AND APPLICABLE LABOR LAWS

A. Peaceful Speech Activity is Protected by the California Constitution.

Municipal Code section 52.80.01 is a local criminal trespass statute. Municipalities are authorized to enact trespass laws. Cal. Penal Code § 647c; *In re Cox*, 3 Cal. 3d 205, 220 (1970). State law contains a prohibition similar to that contained in Municipal Code section 52.80.01. California Penal Code (Penal Code) section 602.1 prohibits intentionally interfering with any lawful business open to the public by obstruction or intimidation, and refusing to leave after a request by the owner, owner’s agent, or peace officer acting at the owner or agent’s request. This section also contains exceptions for lawful labor union activities, and for engaging in activities protected by the state or federal constitution. Cal. Penal Code § 602.1(c)(1)-(2).³

The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const.

³ The full text of Penal Code section 602.1 is set forth in Attachment B.

amend. I. The United States Supreme Court explained that under the United States Constitution, private property does not “lose its private character merely because the public is generally invited to use it for designated purposes.” *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 569 (1972). The Court found that there was no First Amendment right to distribute handbills in a private shopping center. *Id.*

California’s constitutional guarantee of free speech is more expansive than that contained in the federal constitution.⁴ *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 908-10 (1979) (affirmed, *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980)). Article 1, Section 2 of the California Constitution provides that “[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech. . . .” California’s ability to offer additional constitutionally protected speech rights was recognized in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (“Our reasoning in *Lloyd*, however, does not . . . limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.”).

Although both local and state trespass statutes have been upheld as reasonable regulations of conduct not offending the freedom of speech, the property rights protected by trespass statutes are not exclusive. Free speech rights may prevent enforcement of trespass laws under certain conditions. *In re Wallace*, 3 Cal. 3d 289 (1970) (reversing a state law trespass conviction for defendant who distributed anti-automation literature on fairgrounds when record was devoid of any evidence of actual obstruction or intent to obstruct fair business); *In re Hoffman*, 67 Cal. 2d 845 (1967) (striking down municipal trespass ordinance which forbid presence in a railway terminal longer than necessary to conduct business as abridgment of speech rights; defendant’s distribution of anti-war literature did not interfere with the railway use of the terminal); *In re Lane*, 71 Cal. 2d 872 (1969) (conviction for municipal code trespass violation overturned; labor union petitioner’s distributing handbills on private sidewalk open to the public protected by the constitution; no evidence of blocking ingress or egress).

Conversely, conduct that blocks access to the business or interferes with the business is outside the ambit of protected speech. *In re Ball*, 23 Cal. App. 3d 380 (1972) (upholding state law trespass conviction when defendant blocked entrance to Disneyland despite defendant’s assertion of constitutional protections for activity of gathering signatures and donations for anti-pollution initiative); *Hamburg v. Wal-Mart*, 116 Cal. App. 4th 497, 509 (2004) (misdemeanor trespass in violation of Penal Code section 602.1 requires intentional interference with a business through the obstruction or intimidation of customers).

In the case of *In re Cox*, petitioner was arrested and charged with violating a San Rafael trespass ordinance similar to San Diego’s ordinance. Petitioner argued, among other things, that San Rafael’s ordinance was facially invalid, as it was vague and broad. *In re Cox*, 3 Cal. 3d at 221. The ordinance prohibited persons from remaining upon any private property or business premises after being told to leave. The exceptions included “[w]here its application would result

⁴ Therefore, all further references to freedom of speech, or similar terms, refer to the rights protected by the California Constitution, which necessarily include those protected by the United States Constitution.

in an interference with or inhibition of any other exercise of a constitutionally protected right of freedom of speech such as (but not limited to) peaceful expressions of political or religious opinions, not involving offensive personal conduct” *Id.* at n.2. In particular, petitioner alleged that the phrase “offensive personal conduct” was vague and broad. *Id.* at 221. The California Supreme Court construed the provision to avoid any constitutional infirmity.

Thus, in order similarly to save the constitutionality of San Rafael Municipal Code section 8.12.210, we must construe it to encompass both the protection of the property owner’s legitimate interest in preventing physical interference with the business use, disturbances of the peace . . . or physical obstruction of the premises . . . as well as the preservation of “an effective place for the dissemination of ideas.” (*See In re Hoffman*, 67 Cal. 2d 845, 853 (1967)). We therefore construe the trespass ordinance, and particularly the words “offensive personal conduct,” as applied to the use of streets, sidewalks, and other public areas, to coincide with those offenses punishable under Penal Code section 647c (obstruction of a street, sidewalk, or other public area). . . and under Penal Code section 415 (disturbing the peace)

Id. at 223 (internal citations omitted).

Case law has thus developed to balance speech rights and private property interests. San Diego’s ordinance seeks that same balance. The exceptions contained in Municipal Code section 52.80.01(c)(2) address activities protected by the state and federal constitutions. Picketing, labor activities, and political activities are traditional categories of protected speech. *See People v. Medrano*, 78 Cal. App. 3d 198, 211 (1978) (disapproved on other grounds), and cases cited therein (“free speech” includes the expression of religious and political ideas, union activity, and picketing). The exceptions contained in Municipal Code section 52.80.01(c)(2) are, therefore, a statutory protection and recognition of those activities traditionally entitled to constitutional protection in the arena of criminal trespass law.

The exceptions contained in Municipal Code section 52.80.01(c)(2) are also intended to ensure that the statute is applied in a constitutional manner. *See Cox v. Louisiana*, 379 U.S. 536 (1965) (striking down statute prohibiting obstruction of public passageways because the statute was applied in a discriminatory fashion by law enforcement and city officials); *In re Cox*, 3 Cal. 3d at 223-24 (upholding municipal trespass ordinance as constitutional on its face and relegating to the trial court the initial inquiry into whether or not defendant’s conduct was otherwise protected by the First Amendment of the United States Constitution). Without the exceptions, the statute could be enforced in a manner that infringes on free speech rights. Therefore, the exceptions ensure that constitutional free speech rights are protected.

B. Protected Peaceful Activity Can be Defined by Using Analogous Labor Laws.

In California, Penal Code section 552.1 exempts persons engaged in lawful and peaceful labor activities, including picketing on a private sidewalk, from certain criminal trespass laws. Cal. Penal Code § 552.1; *Ralphs Grocery Co. v. United Food and Commercial Workers Union*

Local 8, 55 Cal. 4th 1083, 1096, 1104 (2012). To be entitled to the exemption, the activity must be peaceful. In *Ralphs*, picketers walking back and forth on a private entrance walkway, carrying pickets, speaking to customers, and handing out flyers were considered peaceful. *Id.* at 1088-89, 1104. *Ralphs* relied on three cases which described peaceful picketing: *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union*, 61 Cal. 2d 766 (1964) (carrying signs on sidewalk in front of bakery); *In re Lane*, 71 Cal. 2d 872 (1969) (distributing handbills on privately owned sidewalk in front of store); and *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 25 Cal. 3d 317 (1979) (posting pickets on privately owned sidewalks immediately surrounding the store). *Sears* distinguished between activities which are peaceful and not peaceful, noting that the picketers conducted themselves peacefully and orderly, with no acts of violence, threats of violence, or obstruction of traffic. *Id.* at 321.

Sears emphasized that “conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity” were not protected, peaceful activities under the Moscone Act. *Sears*, 25 Cal. 3d at 330; Cal. Civ. Proc. Code § 527.3(e). For example, trespassory picketing, by itself, was not sufficient to enjoin the otherwise peaceful picketing; however, picketing which blocked access was not peaceful picketing because it was likely to produce violence. *Sears*, 25 Cal. 3d at n.11; *Kaplan's Fruit & Produce Co., Inc. v. Superior Court of Los Angeles County*, 26 Cal. 3d 60 (1979) (obstructing access was not peaceful picketing). Similarly, other cases decided picketing was not peaceful if the activities fell within the conduct described in section 527.3(e) of the California Code of Civil Procedure. *M Restaurants, Inc. v. San Francisco Local Joint Executive Bd. Of Culinary Workers, Bartenders, Hotel, Motel and Club Service Workers*, 124 Cal. App. 3d 666 (1981) (intimidating potential customers and business owners; blocking access or deliveries to restaurant); *Bertuccio v. Superior Court of San Benito Cty*, 118 Cal. App. 3d 363(1981) (threatening violence and obstructing access); *International Molders and Allied Workers Union, Local 164, AFL-CIO v. Superior Court for San Joaquin County*, 70 Cal. App. 3d 395 (1977) (threatening violence, and interfered with access and freedom of movement).

Thus, under both the California Constitution and analogous labor laws, a criminal trespass does not occur if the activity is “peaceful.” Blocking access or other unlawful conduct, however, is not considered peaceful.

III. “POLITICAL” ACTIVITY MUST BE READ IN A MANNER CONSISTENT WITH CONSTITUTIONAL LAW AND THE FREEDOM OF SPEECH

According to Black’s Law Dictionary(9th ed. 2009), political means “pertaining to politics; of or relating to the conduct of government.” In the context of evaluating employment discrimination claims based on political discrimination, the court in *Barry v. Moran* said “[w]ithout purporting to be exhaustive, the term ‘political,’ in the relevant First Amendment sense, pertains to the conduct of government, public policy or public policies.” (Citations omitted.) *Barry v. Moran*, 661 F. 3d 696, 704 (1st Cir. 2011). The meaning of the word “political” in this context must be construed in the context of freedom of speech and trespass case law. If read too narrowly, such as excluding religious or other types of protected activity, the ordinance is subject to challenge as content-based regulation.

A regulation is content-based if the underlying purpose is to suppress particular ideas, or if it singles out particular content for differential treatment. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Such a regulation will be valid only if it serves a compelling government interest in the least restrictive manner possible. *Snatchko v. Westfield LLC*, 187 Cal. App. 4th 469, 491-92 (2010). In this case, allowing, for example, religious speech to be punished as a trespass, while exempting “political” speech, would likely not be defensible. There is nothing in the history of the ordinance or similar trespass statutes, which provides a compelling government interest in elevating some protected speech over others. Likewise, Municipal Code section 52.80.01(c)(2) exempts picketing speech directed at the business in question, another exemption which a court could construe as content-based.

As in the case of *In re Cox*, a court could read the ordinance in a manner to uphold its constitutionality by giving “political” a reading consistent with providing protection to all activity protected by the California Constitution, not just purely “political” activity. *See In re Cox*, 3 Cal. 3d at 223.

IV. AMENDING MUNICIPAL CODE SECTION 52.80.01 BY UPDATING THE LANGUAGE CONTAINED WITHIN THE EXCEPTIONS WOULD STRENGTHEN THE ORDINANCE AND LIMIT LEGAL CHALLENGES

Given that the exceptions listed in Municipal Code section 52.80.01(c) may be construed as content-based regulation of speech, it may be prudent to consider amending or repealing this entire section.

As discussed above, Penal Code section 602.1(a) makes it a misdemeanor for any person to intentionally interfere with a business open to the public by obstruction or intimidation and refuse to leave the business upon request of the owner or owner’s agent. This section also applies to any business carried on by the employees of a public agency open to the public. Cal. Penal Code § 602.1(b). Penal Code section 602.1 contains exceptions for persons engaged in union activity, or in activities protected by the state or federal constitution. Cal. Penal Code § 602.1(c).

The City could rely on Penal Code section 602.1 to provide business owners with protection from trespassers. However, the Penal Code does not have a provision which bars re-entry within 48 hours of a request to leave. *Cf.* SDMC § 52.80.01(b) (prohibiting re-entry within 48 hours). Moreover, to prove a violation of this section, a prosecutor must prove intentional interference by actual obstruction or intimidation.

In contrast, Municipal Code section 52.80.01 fills a notable gap in state law. The California Supreme Court noted that despite an “impressive array” of state trespass laws, “the state has significantly failed to prohibit a would-be customer, after being requested to leave, from remaining on business premises generally open to the public.” *In re Cox*, 3 Cal. 3d at 219. Municipal Code section 52.80.01 offers this additional protection for business owners by allowing them to request a person using the business premises for a purpose contrary to the business’ functions to leave, and punishing a refusal or a return. This section does not require the specific types of interfering conduct (obstruction or intimidation) necessary to prove a violation of Penal Code section 602.1.

The Municipal Code also offers a tool for prosecutors not present in Penal Code section 602.1. A violation of Municipal Code section 52.80.01 is a misdemeanor but can be charged as or reduced to an infraction at the discretion of the City Attorney. SDMC § 12.0201. This option provides prosecutors with flexibility during plea bargain negotiations. Penal Code section 602.1 is a non-reducible misdemeanor. *See* Cal. Penal Code § 19.8.

Given these factors, Municipal Code section 52.80.01 appears to be a useful local ordinance. The Police Department has used this section in a citation or arrest over 200 times in the past five years. (San Diego Police, Crime Analysis, April 6, 2015).

If the Council does not wish to repeal the trespass ordinance, another option would be to amend Municipal Code section 52.80.01(c)(2) to clarify that the section does not apply to persons engaged in activity protected by the state and federal constitutions.⁵ Such an amendment would bring Municipal Code section 52.80.01(c)(2) into close alignment with the exceptions contained in Penal Code section 602.1(c).

Language exempting constitutionally protected activities from certain statutes is not unique to Penal Code section 602.1. Penal Code section 626.8, prohibiting certain types of trespass on school grounds, contains an exception for the “lawful exercise of constitutionally protected rights of speech or assembly.” Cal. Penal Code § 626.8(e). Similarly, Penal Code sections 602(o), prohibiting trespass on private property not open to the public, and 420.1, prohibiting interference with certain property rights, both contain an exception for “activities protected by the California or United States Constitution.” Likewise, Penal Code section 646.9, prohibiting stalking, excludes “Constitutionally protected activity” from the definition of “credible threat.” Cal. Penal Code § 646.9(g).

The exception language in these statutes does not appear to have been challenged. Generally, “[a] statute challenged for overbreadth is not void if its terms are reasonably susceptible to an interpretation consistent with the Constitution.” *People v. Zimmerman*, 15 Cal. App. 4th Supp. 7, 12 (1993). In *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff's Department*, 533 F.3d 780, 792 (9th Cir. 2008), the Court interpreted the exception in Penal Code section 626.8(e) to support an interpretation of the law consistent with constitutional principles. If challenged, the exception in Penal Code section 602.1(c) also invites an interpretation of the statute consistent with constitutional law. The same would be true for Municipal Code section 52.80.01 if similar language was adopted. Neutralizing and broadening the language in Municipal Code section 52.80.01(c) would strengthen the defensibility of the ordinance and clearly establish intent to uphold constitutional rights while also protecting the private property rights of business operators.

⁵ In addition, the language contained in Municipal Code section 52.80.01(c)(1) is out of date. This language should either be updated to reflect the current scope of the Unruh Civil Rights Act, or made neutral to withstand future updates to state law.

CONCLUSION

The City may enact a local trespass ordinance. However, such an ordinance must be consistent with constitutional free speech protections, and must be applied in a constitutional manner. Based on the development of the law since 1977, the City Council should review this section and, if desired, make any necessary amendments to ensure consistency with current law. A proposed amended ordinance is provided for consideration and reference in Attachment C. The proposed ordinance would proceed through the appropriate Council Committee docketing process.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Michelle A. Garland
Michelle A. Garland
Deputy City Attorney

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Attachments